1997 Appellate Review of MERC Decisions

Complied by Roy L. Roulhac, MERC ALJ

Michigan Supreme Court

Clerical-Technical Union of Michigan State University v Michigan State University Board of Trustees and Michigan State University Administrative-Professional Association, MEA/NEA (Intervenor), 455 Mich 862 (July 15, 1997). The Court "in lieu of granting leave to appeal" reversed the Court of Appeals (214 Mich App 42 (1995) and reinstated MERC's decisions which are reported at 1993 MERC Lab Op 409 and 1993 MERC Lab Op 345. According to the Supreme Court, the Court of Appeals exceeded the scope of its review power and substituted its own judgment for MERC's in reversing MERC decision not to order a return to the status quo after finding the Employer guilty of a unilaterally removing positions from a bargaining unit. The Court of Appeals had also concluded that MERC erred by not making a fining of whether the Employer provided illegal assistance to the intervenor and for failing to make a finding on the appropriate bargaining unit.

Michigan Court of Appeals

AFSCME v Michigan Department of Mental Health and Summer's Living Systems, Inc., Et Al (COA Dkt No. 2/13/97, unpublished). The Court dismissed as moot appeals of the Michigan Department of Mental Health which asserted that MERC lack jurisdiction over the MDMH in eight cases where MERC had found MDMH and eight providers of residential care services to the developmentally disabled were joint employers. In 1996 PA 543, the legislature redefined the definition of public employee under PERA to mean individuals "employed by a privte organiztion or entity that provides services under a time-limited contract with the state or a political subdivision of the state." This amendment eliminated the MDMH as an empoyer of employees working in group homes. Further, the NLRB has begun exerting jurisdiction over such providers. See *Management Training Corp.,* 317 NLRB 1355 (1995) and *Pikeville United Methodist Hospital v NLRB,* ____ F3rd ___6th Cir, 1997); 1997 U.S. App. LEXIS 6089. Subsequently, on March 24, the Court, pursuant to the parties stipulation dismissed 24 similar cases and in *Central States Community Service and Michigan Department of Mental Health* and *AFSCME (*COA Dkt No. 189836, 10/14/97, unpublished) vacated MERC's finding that Central States and the Michigan Departmentof Mental Health were jointly liable for certain unfair labor practices, including discriminating against employees for union organizing. It noted that the labor activity was at least "arguably" subject to the provision of the NLRA. MERC's opinion is reported at 1995 MERC Lab Op 552. MERC has dismissed all pending cases in which AFSCME alleged that MDMH and residential home providers were joint employers.

Van der Waard v Chelsa Bus Driver Association (COA Dkt No. 190579, 1/7/97, unpublished). The Court affirmed MERC's order directing the Chelsa Bus Drivers Association to pay the

Charging Party $7,018.40, plus interest, for causing her discharge for non-payment of union dues. The Union had failed to properly notify Van Der Waard of her dues arrearage and offer her an opportunity to make payment. On appeal, the Court rejected the Union's claim that the ALJ erred by denying its request to review a confidential settlement agreement between Charging Party and the Chelsa School District and thereby impeded its ability to cross-examine a witness who testified against it. MERC's decision are reported at 1994 MERC Lab Op 310 and 1995 MERC Lab Op 623.

Reid v City of Flint and Flint Fire Fighters Union (COA Dkt No. 17831, 3/25/97, unpublished). Reid was discharged from his fire fighter position in 1987. In a June 1989, MERC dismissed his charge that the Union did not breach its duty of fair representation. Reid filed exception with MERC and a motion for reconsideration but failed to appeal to the Court. Four years later, Reid again filed a MERC charge arising from the same events that formed the basis for his first complaint; this time against both the Union and the City. The Court affirmed MERC dismissal of his new action, finding that the claim against the city was barred by the statute of limitations and the claims against the union was barred under the doctrine of *res judicata.* The Court rejected Plaintiff's argument that the six month limitation period was tolled by filing a suit against the city in federal district court (the lawsuit did not involve the same cause of action although it arose from the same facts, i.e., charging party's discharge) and the subsequent filing of a complaint with MERC within six months after the US Supreme Court denied certiorari. Arguing against application of the doctrine of *res judicata*, Plaintiff claimed to have alleged a new charge of "wrongful conspiracy in violation of MCL 423.24(a) [MSA 17.454(26)(a),]" which provides for criminal penalties in cases of conspiracy to violate the state's labor dispute laws.

Wayne County and Local 1659, Council 25, AFSCME and *AFSCME Council 25 & AFSCME Locals 25 and 409 and AFSCME Local 101* (COA Dkt No. 190660, 4/11/97, unpublished). The Court affirmed MERC's decision to accrete a unit of Wayne County nonsupervisory employees, who had continued to be represented by AFSCME Local 101 long after the Wayne County Road Commission, the former employer, was abolished to a nonsupervisory unit of Wayne County employees represented by AFSCME Local 1659. The Court rejected Local 101's, Council 25's and two other locals which had intervened arguments that MERC erred in issuing its decision without an evidentary hearing. The Court, citing *Sault Ste Marie Area Public Schools v Michigan Education Ass'n*, 213 Mich App 176, 182, that MERC is not required to hold a hearing in representation cases because they are not contested cases under the Michigan administrative procedures act. MERC's decisions are reported at 1995 MERC Lab Op 419 and 1995 MERC lab Op 616.

Kent County Deputy Sheriff's Ass'n and Kent County Sheriff & County of Kent and *Kenty Couty Employees Union*, (Dkt No. COA 195601, 1/19/97, unpublished). The Union Court rejected the Union's challenge MERC's decision that four new positions created within the corrections division as a result of the jail's construction and renovation was not a mandatory bargaining subject. The Court, relying on *Southfield Police v Southfield*, 433 Mich 168, 168 (1989), held that since the Association failed to make an initial showing that the duties assigned to the new positions has been performed exclusively by its corrections officers, no duty to bargain existed. MERC's decision is reported at 1996 MERC Lab Op 294.

POAM v Ottawa County Sheriff (COA Dkt No. 194712, 11/21/97, unpubished). The union's charge alleged that the Sheriff's discipline of its vice president because of statements he made to the media was interference, restraint and/or coercion of the exercise of his Section 9 PERA rights with the intent to discourage union membership. In an article which appeared in the *Grand Rapids Press* regarding a jail break which resulted in a police officer's death, the vice president was critical of staffing levels and jail conditions. MERC's held that the sheriff had a substantial and legitimate business justification for reprimanding the officer for violating rules concerning unauthorized communications with the media.

The Court disagreed and found that the officer spoke in his capacity as a union officer on behalf of the membership about matters which were clearly directed at matters of ongoing concern to the union. The Court observed that the statement constituted concerted protected activity since no competent evidence existed to show that confidential information was revealed, the statements were inaccurate, or they impeded an ongoing criminal investigation. MERC's decision is reported at 1996 MERC Lab Op 221.

Compare *City of Detroit,* 1997 MERC Lab Op 457, where, on exceptions, the Commission affirmed ALJ holding that false statement to media by union president which could have alarmed public was not protected activity and employer had legitimate and substantial business justification to restrict his statement (Township had stopped called off-duty firefighters in for fire runs).